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No. 01-679

In the Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
PETITIONERS

v.

JOHN DOE

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a student may sue a private university for damages under 42 U.S.C. 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (1994 & Supp. V 1999), which bar the furnishing of federal funding to educational institutions that have a policy or practice of permitting education records to be released to unauthorized persons.

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INTEREST OF THE UNITED STATES

This case concerns the enforcement of the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g (1994 & Supp. V 1999), which applies to educational agencies and institutions that receive financial assistance under federal education programs administered by the Secretary of Education. 20 U.S.C. 1232g(a) and (b) (1994 & Supp. V 1999). FERPA directs the Secretary to "take appropriate actions to enforce" FERPA and "deal with violations of" the Act, 20 U.S.C. 1232g(f), and to establish an office and review board for the purpose of "investigating, processing, reviewing, and adjudicating" complaints alleging violations of FERPA, 20 U.S.C. 1232g(g).

STATEMENT

1. The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g (1994 & Supp. V 1999), prohibits the Secretary of Education from providing federal funding to any public or private "educational agency or

institution," unless it complies with requirements established by FERPA concerning access to and disclosure of students' education records. 20 U.S.C. 1232g(a)(1)(A), (a)(3), and (b)(1), 1221(c) (1994 & Supp. V 1999); see also 34 C.F.R. 99.1. This case concerns an unauthorized release of education records. Subsection (b) of FERPA provides, in relevant part:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein * * *) of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999); accord 20 U.S.C. 1232g(b)(2).[1] If a student has reached the age of eighteen or is enrolled at a postsecondary educational institution, the school must seek consent for the release of records from the student instead of the parents. 20 U.S.C. 1232g(d). The "education records" covered by FERPA generally are defined as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. 1232g(a)(4)(A).

FERPA expressly directs the Secretary to "take appropriate actions to enforce" FERPA and "to deal with violations," in accordance with enforcement authority conferred elsewhere in Title 20. 20 U.S.C. 1232g(f); see 20 U.S.C. 1234

[1] FERPA permits disclosure if one of sixteen exceptions applies. See, *e.g.*, 20 U.S.C. 1232g(b)(1)(A)-(J) (1994 & Supp. V 1999); 20 U.S.C. 1232g(b)(6) (Supp. V 1999); 20 U.S.C. 1232g(b)(7)(A); 20 U.S.C. 1232g(i); 20 U.S.C. 1232g(j) (added by Pub. L. No. 107-56, Title V, § 507, 115 Stat. 367 (2001)).

et seq. FERPA further requires the Secretary to establish an office and review board within the Department of Education to "investigat[e], process[], review[], and adjudicat[e] violations of" FERPA and "complaints which may be filed concerning alleged violations of" FERPA. 20 U.S.C. 1232g(g). The Secretary has promulgated regulations interpreting FERPA's requirements and establishing an administrative review procedure for processing individual complaints under FERPA. 34 C.F.R. Pt. 99. FERPA specifically provides for centralized control over its administration and interpretation. 20 U.S.C. 1232g(g) ("[E]xcept for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices" of the Department of Education.).

2. Petitioner Gonzaga University is a private university that offers teacher training through its School of Education. Pet. 3; Pet. App. 30a. During the relevant time period, Washington's teacher certification regulations required student teachers to obtain from their universities a certificate of good moral character and personal fitness to teach. See Pet. App. 40a-42a (discussing Wash. Admin. Code § 180-75-082 (1997) (*repealed* effective Mar. 8, 1997)). Petitioner Roberta League is Gonzaga's teacher certification specialist. Pet. App. 2a.

While a student of elementary education at Gonzaga, respondent had a sexually intimate relationship with Jane Doe. Pet. App. 2a. In October 1993, League overheard a complaint that respondent might have engaged in acts of sexual misconduct against Jane Doe. *Ibid.* League investigated and obtained information suggesting that respondent might have raped Jane Doe. See *id.* at 3a-6a. League discussed the allegations with an investigator for the state agency responsible for teacher certification, to whom League identified respondent by name. *Id.* at 5a. Based on the information obtained during the investigation, the Dean refused to

provide respondent with the moral character affidavit needed for his teacher certification. *Id.* at 6a.

3. Respondent filed suit against petitioners in state court, alleging violations of FERPA and Washington tort and contract law. See Pet. App. 34a-35a. Following trial, a jury found in respondent's favor on all of his claims and awarded him $1,155,000 in damages. *Id.* at 36a. The award included $150,000 in compensatory damages and $300,000 in punitive damages against petitioners for the violation of FERPA. *Ibid.*

The Court of Appeals of Washington reversed. Pet. App. 30a-53a. With respect to respondent's FERPA claim, the court concluded that FERPA does not create individual rights enforceable under Section 1983, reasoning that "FERPA requires participating schools to have in place a system-wide plan; the law is not intended to ensure that 'the needs of any particular person have been satisfied.'" *Id.* at 47a.

The Washington Supreme Court reversed in relevant part and reinstated the FERPA judgment and damages award. Pet. App. 1a-28a. The court concluded that FERPA creates privately enforceable rights because it "is intended to benefit students," FERPA's terms are amenable to judicial enforcement, and FERPA's obligations are mandatory. *Id.* at 20a.

SUMMARY OF ARGUMENT

A. In determining whether a federal statute gives rise to a Section 1983 action, this Court asks first whether the statutory provision in question creates personal entitlements of the sort that may be enforced through the medium of a private judicial cause of action. FERPA's non-disclosure rule creates no such personal rights. FERPA's text—which provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution"

that fails to comply with FERPA's confidentiality provisions (20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999))—speaks not in terms of a benefitted class, nor even in terms of the obligations of fund recipients. Rather, FERPA operates directly on the Department of Education, regulating that agency's disbursement of federal funds. The purported class of private beneficiaries is thus two steps removed from the principal focus of the statutory text. When Congress intends to create individual substantive rights, it usually does not legislate so elliptically.

Furthermore, to the extent FERPA's disclosure provisions focus on the recipients of federal financial assistance, they refer only to the systemwide "polic[ies] or practice[s]" of those recipients. 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999). The statute thus is not concerned with individualized instances of non-consensual disclosure. It therefore resembles the type of provisions that this Court held in *Blessing* v. *Freestone*, 520 U.S. 329 (1997), do not create private rights under Section 1983. While FERPA strengthens and reinforces the preexisting privacy rights of students and their parents, FERPA's disclosure provisions themselves are framed as a federal overlay of rules and guidelines for record management by educational institutions. In short, FERPA's disclosure provisions complement extant rights; they do not create new ones.

B. Even if FERPA were to be construed as creating individual entitlements, recognition of a cause of action under Section 1983 to enforce the statute would be inappropriate because Congress has directed the Secretary, not the courts, to "enforce" FERPA and "deal with" violations, and to investigate and adjudicate individual complaints. 20 U.S.C. 1232g(f) and (g). FERPA thus contains precisely what was missing in other cases where this Court has found a Section 1983 action to be available: a federal tribunal for the resolution of individual charges arising under FERPA.

Congress, moreover, made clear that the administration and interpretation of FERPA should remain centralized and under the control of the Secretary of Education. 20 U.S.C. 1232g(g). Superimposing on that administrative scheme a Section 1983 action that could be invoked by any of the 58 million public school students subject to FERPA in any state or federal court across the country would displace Congress's intended unitary enforcement procedures with precisely the myriad, decentralized sources of enforcement and interpretive authority that Congress wished to avoid.

ARGUMENT

THE RECORDS-DISCLOSURE PROVISIONS OF THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT DO NOT CREATE PRIVATE RIGHTS THAT MAY BE ENFORCED UNDER 42 U.S.C. 1983

Section 1983, 42 U.S.C. 1983, creates a private cause of action against any person who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. This Court held in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), that Section 1983 "means what it says" and thus authorizes suits by private individuals against state actors who violate rights created by federal "laws," including laws enacted pursuant to Congress's authority under the Spending Clause, U.S. Const. Art. 1, § 8, Cl. 1. *Thiboutot*, 448 U.S. at 4. This Court has reaffirmed that holding on numerous occasions. See, *e.g.*, *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997); *Suter* v. *Artist M.*, 503 U.S. 347, 355 (1992); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990); *Wright* v. *City of Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 423 (1987). Congress has ratified *Thiboutot*'s construction of Section 1983. See 42 U.S.C. 1320a-2, 1320a-10.

Not every violation of a federal statute, however, constitutes a deprivation of "rights" within the meaning of Section

1983. *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 106 (1989). The statute must create individual, judicially enforceable rights. *Ibid.*; see also *Blessing*, 520 U.S. at 340; *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 15-30 (1981). In addition, the statute must not foreclose private enforcement either expressly or impliedly. *Blessing*, 520 U.S. at 341; *Golden State*, 493 U.S. at 106; see also *Smith* v. *Robinson*, 468 U.S. 992, 1009-1013 (1984); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13-20 (1981). Under those principles, a cause of action does not lie under Section 1983 for private enforcement of FERPA's records disclosure provisions.[2]

A. FERPA's Records-Disclosure Provisions Focus On Funding By The Department Of Education And The Systemwide Operations Of Educational Institutions, Not Individual Entitlements of Students

Under this Court's decision in *Blessing*, a federal statute creates judicially enforceable "right[s]," within the meaning of Section 1983, if (i) Congress intended that the provision in question benefit the putative plaintiff; (ii) the provision is unambiguously binding and mandatory on the States, rather than precatory; and (iii) the right is not so "vague and amorphous" that its enforcement would "strain judicial competence." 520 U.S. at 340-341; see also *Wilder*, 496 U.S. at 509.

At the outset, petitioners err in contending (Pet. 9-11) that the appropriate test for discerning whether the statute creates privately enforceable rights is not *Blessing/Wilder*'s three-part test, but is instead whether Congress "unambiguously confer[red]" (Pet. 9) a right to a private action under Section 1983 (Pet. 9 (quoting *Suter* v. *Artist M.*, 503 U.S. at 357)). In *Suter*, the Court held that private individuals could

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[2] The Court reserved this question in *Owasso Independent School District* v. *Falvo*, No. 00-1073, slip op. 3-4 (Feb. 19, 2002).

not sue to enforce a provision of the Social Security Act that required States receiving funds for adoption assistance to submit a plan to the Secretary of Health and Human Services in which the State agreed, among other things, to make "reasonable efforts" to keep children in their own homes. 503 U.S. at 351. That language did not create rights privately enforceable under Section 1983, the Court explained, because the statute required only that "the State have a plan approved by the Secretary which contains the 16 listed features," *id.* at 358. Beyond that, the "reasonable efforts" proviso "impose[d] only a rather generalized duty," *id.* at 363, and "left a great deal of discretion" to the State, *id.* at 362.

Read in context, *Suter*'s references to unambiguity were simply a particularized application of *Pennhurst*, which requires Congress to make clear that it intends to impose binding conditions on the receipt of federal funds. As *Suter* observed, *Pennhurst* establishes that, "'if Congress intends to impose a condition on the grant of federal money, it must do so unambiguously.'" *Suter*, 503 U.S. at 356 (quoting *Pennhurst*, 451 U.S. at 17). In *Suter*, the Court held that, although the requirement that the State have the "reasonable efforts" provision in its state plan was mandatory, the content of the generalized "reasonable efforts" standard was too amorphous, ambiguous, and subject to variation based on circumstances to be privately enforceable in any particular case. See 503 U.S. at 360, 362-363. That, in fact, is how this Court understood *Suter* in *Blessing*. See 520 U.S. at 345.

Once Congress makes clear its intention to impose binding conditions on the receipt of federal funds, however, ordinary rules of statutory interpretation apply to determine the scope of those conditions and their means of enforcement. Congress need not go further and warn in advance of "the remedies available against a noncomplying State." *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983). Section 1983's

text already makes that clear. Indeed, none of the statutes at issue in *Blessing*, *Wilder*, *Golden State*, *Thiboutot*, or other cases in which this Court found an action under Section 1983 available, contained such unambiguous remedial language. Moreover, to the extent petitioners read *Suter* as imposing requirements for determining that an action under Section 1983 is available that go beyond those applied in prior cases, Congress has since provided otherwise with respect to the very statute under which *Suter* arose—the Social Security Act. See 42 U.S.C. 1320a-2, 1320a-10.[3] The proper test for identifying rights enforceable under Section 1983 thus remains, as this Court recognized in *Blessing*, the three-part inquiry outlined above.

Applying that test, the records-disclosure provisions of FERPA fail to support recognition of a right to private enforcement under Section 1983. In particular, although the question is a close one, the combination of how Congress structured the funding restriction and how it phrased the prohibitory language in FERPA, taken together, demonstrates that FERPA's disclosure provisions do not create individual rights.[4]

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[3] Section 1320a-2 (like Section 1320a-10) provides:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., [503 U.S. 347] (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

[4] FERPA appears to satisfy the second and third prongs of the *Blessing* test, however. FERPA's disclosure requirements, 20 U.S.C. 1232g(b), are neither precatory nor vague and amorphous. The statute provides as a condition of federal funding that "education records," as

1. The Duties Under FERPA's Records-Disclosure Provisions Run Primarily to the Department of Education

As this Court has recognized in the context of identifying whether a federal statute creates an implied right of action, the focus of the statutory text provides the most persuasive evidence of whether Congress intended its provisions to benefit a particular class in the sense necessary to render them judicially enforceable in a lawsuit brought by a private party. See *Alexander* v. *Sandoval*, 532 U.S. 275, 288-289 (2001); *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 (1979). The same is true in deciding whether "rights" are "secured" by a federal statute for purposes of invoking the express cause of action under Section 1983.[5]

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defined by the statute and regulations (20 U.S.C. 1232g(a)(4); 34 C.F.R. 99.3), and personally identifiable information within those records may not be released or disclosed "without the written consent of the[] parents" or unless one of the sixteen carefully drawn exceptions applies. 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999); see also 20 U.S.C. 1232g(b)(2). Nor does FERPA simply "nudge" fund recipients "in the preferred direction[]." *Pennhurst*, 451 U.S. at 19. Its prohibition on policies and practices of unauthorized disclosure as a condition of federal funding is direct and mandatory.

[5] There is an obvious parallel between the inquiry under Section 1983 whether Congress "intended that the provision in question benefit the plaintiff," *Blessing*, 520 U.S. at 340, and the initial inquiry in implied-right-of-action analysis whether "the statute was enacted for the benefit of a special class of which the plaintiff is a member," *Cannon*, 441 U.S. at 689. See also *Pennhurst*, 451 U.S. at 28 n.21 (holding that, because the statute "confers no substantive rights," there was no need to decide "whether there is a private cause of action under that section or under 42 U.S.C. § 1983 to enforce those rights"). The remaining *Cort* v. *Ash*, 422 U.S. 66 (1975) factors—whether Congress intended to create or deny a remedy, whether the remedy would be consistent with the underlying purposes of the legislative scheme, and whether it would be inappropriate to infer a cause of action because the matter is traditionally governed by state law (*id.* at 78)—have no direct application to determining whether the cause of action Congress expressly created in Section 1983 is available to vindicate the statutory right. That is because the implied cause of action inquiry

In *Blessing*, for example, the Court found no individual right to judicial enforcement of the requirement that state child support systems be in "substantial compliance" with the statute and federal regulations because that provision spoke in terms of regulating the interactions of the state and federal governments, rather than creating new federal rights for individual beneficiaries. See 520 U.S. at 335, 343. The rent provision at issue in *Wright*, by contrast, was found to create an individually enforceable right because the statute provided formulae and other standards specifying and limiting the amount of rent that local public housing authorities could charge to a tenant family. 479 U.S. at 420 & n.2. Similarly, this Court has held that Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, protect individuals against discrimination and create individually enforceable rights because those statutes are phrased "with an unmistakable focus on the benefited class." *Cannon*, 441 U.S. at 691; see 42 U.S.C. 2000d ("[n]o person" shall "be subjected to discrimination under any program or activity receiving Federal financial assistance" on the basis of race, color, or national origin); 20 U.S.C. 1681 ("[n]o person" shall "on the basis of sex * * * be subjected to discrimination under any education program or activity receiving Federal financial assistance").

FERPA's prohibition on non-consensual disclosures is distinctively phrased as a limitation on the Department of Education's disbursement of federal funds. See 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999) ("No funds shall be made

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reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because § 1983 provides an "alternative source of *express* congressional authorization of private suits," these separation-of-powers concerns are not present in a § 1983 case.

Wilder, 496 U.S. at 508-509 n.9 (citations omitted); see also *id.* at 525-526 (Rehnquist, C.J., dissenting).

available under any applicable program * * *."); 20 U.S.C. 1232g(b)(2) (same). Unlike the terms of Titles VI and IX, FERPA does not direct that "no parent or student shall be subjected to nonconsensual disclosures of their education records or personally identifiable information contained therein." Nor does FERPA specifically prohibit or require certain conduct on the part of entities that receive federal funds, unlike the statutes in *Wright*, *Wilder*, *Suter*, and *Blessing*. Rather, FERPA speaks directly to the federal funding agency—the Department of Education—barring it from furnishing financial assistance to an educational institution under the specified circumstances.

When statutes are phrased in such a manner, there is "far less reason to infer a private remedy in favor of individual persons," or, by the same token, to hold that Congress intended the legislation to benefit the plaintiff class in the direct and individualized sense that would support recognition of a private right of action. *Cannon*, 441 U.S. at 690-691; see also *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981) (same); *Pennhurst*, 451 U.S. at 13 (statute not designed to benefit plaintiff class where, *inter alia*, the statutory provision was phrased in terms of federal and state governments' "obligation to assure that public funds are not provided to any institutio[n]" that does not comply with federal standards). Indeed, in *Cannon*, the Court indicated that it likely would not have found an individually enforceable right if Title IX had been written simply "as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." 441 U.S. at 692-693; see also *id.* at 693 n.14. That is exactly how Congress structured FERPA.

This case differs in another respect from those in which this Court has found a private right under a federal Spending Clause statute that can be enforced through Section 1983. Respondent did not sue under Section 1983 to obtain

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the benefit or service that the funding statutes support—namely, education. He sued to obtain damages for Gonzaga's failure to comply with a condition on furnishing of the funds. FERPA itself does not provide funds to educational institutions to comply with its terms. Nor does FERPA impose the type of elaborate plan or reporting requirements required in *Wilder*, 496 U.S. at 502-503, and *Blessing*, 520 U.S. at 332-335, in which the fund recipient commits to and explains in detail how it will use the federal funds to deliver the benefits or services that are the *raison d'etre* of the federal funding scheme. FERPA's disclosure provisions are structured, not as a system for delivering entitlements to individuals, but rather as a statutory directive "to guide the [fund recipient] in structuring" its systems for maintaining records and to superintend the administration of records created by the recipient in the course of providing the substantive programs and services (education) that are the focal point of the federal funding scheme. *Blessing*, 520 U.S. at 344. In this respect—and especially in the absence of the rights-creating language present in Titles VI and IX—FERPA's conditions on the furnishing of federal financial assistance bear a closer resemblance to the data-processing and similar administrative requirements that this Court held in *Blessing* did not give rise to individualized rights, *id.* at 344-345, than the claims to particular substantive, in-hand benefits and services that this Court has previously recognized support a Section 1983 action.

2. The Funding Conditions Under FERPA's Records-Disclosure Provisions Focus on the Systemwide "Policies and Practices" of Fund Recipients

The manner in which Congress phrased the scope of FERPA's prohibition on unauthorized disclosures—focusing on "polic[ies] or "practice[s]" (20 U.S.C. 1232g(b)(1))—likewise cuts against the recognition of individual rights that can be enforced under Section 1983. In determining whether a

statute creates such rights, it is not enough that a statute's operation inures generally to the benefit of persons in the plaintiff's class. Rather, the plaintiff must demonstrate that the "provision in question," *Golden State*, 493 U.S. at 106, "creat[es] an *individual entitlement* to services," benefits, or immunity from governmental action. *Blessing*, 520 U.S. at 343 (latter emphasis added). For example, the provision of the Social Security Act at issue in *Suter* required States to exert "reasonable efforts" to keep children in their own homes. While the overall operation of that provision no doubt was intended to protect the interests of parents and children, the Court held that it imposed only a "generalized duty" on the State and thus did not create individually enforceable rights. Likewise, in *Blessing*, the Court held that the requirement that States operate child support programs in "substantial compliance" with extensive federal requirements undoubtedly benefitted children and their custodial parents as a class. The provision, however, did not vest children or parents with individual rights; it served instead as a "yardstick for the Secretary [of Health and Human Services] to measure the *systemwide* performance of a State's Title IV-D program." 520 U.S. at 343.

Applying that standard, the Washington Supreme Court erred in holding that FERPA creates individual rights based on the generalized goal, gleaned from the legislative history, of "assur[ing]" and "protect[ing]" parents' and students' privacy interests. Pet. App. 20a (quoting 120 Cong. Rec. 39,862 (1974) (Joint Explanatory Statement of Sponsors)). The proper inquiry is whether Section 1232g(b)'s disclosure requirements create an individual "entitlement" (*Blessing*, 520 U.S. at 343), on a case-by-case basis, not to have records impermissibly disclosed. They do not.

FERPA's disclosure provisions do not make educational institutions liable for every non-consensual release of education records. They forbid the furnishing of financial assistance only to those educational institutions that have a "policy or practice" of permitting non-consensual disclosure. 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999); 20 U.S.C. 1232g(b)(2). FERPA thus targets an educational institution's systemwide approach to disclosing records and information and, to that end, requires that operational rules be in line with federal requirements. The Act provides no specific protection against particular instances of disclosure and, in that sense, is not concerned with "whether the needs of any particular person have been satisfied." *Blessing*, 520 U.S. at 343.

Moreover, the non-disclosure provisions in Section 1232g(b) spell out in some detail the components of a proper school program for the disclosure of records and the personally identifiable information they contain. Those provisions speak in operational terms of rules and standards governing disclosure, rather than in terms of individual rights or entitlements. The nondisclosure provisions read more like an administrative manual to govern decisions by school officials than a charter of student and parental entitlements. See 120 Cong. Rec. 39,863 (1974) (Joint Statement) (FERPA "establish[es] a minimum Federal standard for record confidentiality and access"); cf. *id.* at 39,862 ("The amendment is intended to require educational agencies and institutions to conform to fair information record-keeping practices.") (discussing records access under FERPA). Indeed, unlike its other provisions, FERPA's disclosure provisions do not refer to parental or student "right[s]." Compare 20 U.S.C. 1232g(b)(1) & (2) (1994 & Supp. V 1999) and 20 U.S.C. 1232g(b)(2) with 20 U.S.C. 1232g(a)(1)(A), (a)(1)(C)(iii), (c), (d), and (e). Instead, the disclosure provisions have a systemic focus. See *Pennhurst*, 451 U.S. at 22.[6]

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[6] We have been informed by the Department of Education that its Family Policy Compliance Office, which administers FERPA (see 34 C.F.R. 99.60(a) and (b)), has issued letters of findings applying FERPA's

Nor does the presence of "rights" language in other FERPA provisions support the Washington Supreme Court's ruling. In the first place, this case concerns only subsection (b) of FERPA, and *Blessing* makes clear that "each separate" statutory provision must satisfy the analytical test for identifying Section 1983 rights on its own, without regard to whether other statutory provisions might create such rights. 520 U.S. at 342.

In any event, the description of a statutory directive as a "right" does not, in itself, control the question of whether Congress intended to "secure[]" those "rights" in the specific sense in which those terms are used in Section 1983. The Court must consider the statutory language and legislative history in context and in light of the Act's overall structure. See *Pennhurst*, 451 U.S. at 18-20 (references to rights and patient "bill of rights" do not create individually enforceable rights when read in the context of the statute as a whole).

There are, to be sure, many references in FERPA and its legislative history to the "rights" of parents and students

terms to particular factual scenarios and finding a violation of FERPA's disclosure provisions without separately inquiring whether the alleged misconduct was part of a larger policy or practice of the educational institution. In some of the letters, the existence of a policy or practice can fairly be inferred from the context (see Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Dr. Kenneth L. Bates (Mar. 11, 1999) (routine meetings with school district officials); Letter from Director Rooker to Dr. Curtis Culwell (Aug. 5, 1998) (disclosure by school principal). In others, it appears unlikely that the charged conduct represented an institutional policy or practice. See Letter from Director Rooker to Dr. Gregory Adkins (Apr. 8, 1997); Letter from Director Rooker to Dr. Joseph Bonita (Oct. 5, 1998). In none of those letters, however, was the Compliance Office called upon to consider the import of the "policy or practice" language. We have lodged copies of those letters with the Clerk of the Court. The Department of Education has now considered that question in the context of this case, and the position taken in this brief is the position of the Department.

protected by FERPA.[7] But most such references serve simply as a shorthand means of describing the records-maintenance and disclosure standards and procedures that Congress imposed on fund recipients. Others just refer to the parents' and students' preexisting "moral or legal rights" to privacy, S. Conf. Rep. No. 1026, 93d Cong., 2d Sess. 186 (1974); H.R. Conf. Rep. No. 1211, 93d Cong., 2d Sess. 186 (1974), to which FERPA adds an additional layer of federal protection, and not to the creation of new and independent federal rights that give rise to a cause of action under Section 1983 for damages. See 120 Cong. Rec. 14,589 (1974) (Sen. Goldwater) (FERPA provides "statutory confirmation" of parental rights); *id.* at 14,590 (in FERPA, "Congress is willing to be the guardian of [student] privacy").

Indeed, without suggesting that FERPA created new federal entitlements or judicially enforceable rights, Congress was at pains to make clear that FERPA "do[es] not affect" whatever preexisting "rights a student or his parents might have in civil proceedings, as in the case where confidentially-received material causes the student or his parents actionable damage." 120 Cong. Rec. 39,863 (1974) (Joint Statement); H.R. Conf. Rep. No. 1211, *supra*, at 187 ("the amendment is intended to protect the legitimate rights of students to be free from unwarranted intrusions"); 120 Cong. Rec. 26,125 (1974) (Rep. Hanrahan) (FERPA "denies funds to schools" when they engage in a "blatant violation of the individual's right to privacy").[8]

[7] See, *e.g.*, 20 U.S.C. 1232g(a)(1)(C)(iii), (d), (e); 120 Cong. Rec. 14,589 (1974) (Sen. Goldwater); 120 Cong. Rec. 26,125 (1974) (Rep. Hanrahan).

[8] In this case, respondent has obtained almost $650,000 based on state law causes of action for invasion of privacy, defamation, and breach of educational contract. Pet. App. 36a.

3. An Analogy to Nineteenth Century Contract Law Is Not an Appropriate Basis for Refusing to Recognize Substantive Rights Enforceable Under Section 1983

Although, on balance, FERPA's disclosure provisions do not create substantive rights under federal law, it would be erroneous to adopt the contention in the petition (Pet. 13-14) that individuals may not enforce the provisions of Spending Clause legislation through actions under Section 1983 because, at the time Section 1983 was enacted, a third-party beneficiary of a contract could not sue to enforce its terms. See also *Blessing*, 520 U.S. at 349-350 (Scalia & Kennedy, JJ., concurring) (leaving open the possibility of adopting that theory).

First, the argument proceeds from an erroneous premise. There is no sound basis for subjecting Spending Clause legislation to a different analysis under Section 1983 than legislation enacted under other sources of congressional power. It is commonplace for a federal law not to govern the conduct of a party unless and until that party voluntarily undertakes the particular activity that is subject to the law, whether that be choosing to operate sewage plants subject to the Clean Water Act, marketing driver's license information subject to the Driver's Privacy Protection Act of 1994, or accepting federal funds under a federal program. The voluntariness with which entities agree to subject themselves to the obligations of federal law thus cannot be determinative of Section 1983 liability.

Second, while this Court has often said that a law enacted pursuant to the Spending Clause operates "in the nature of a contract," *Pennhurst*, 451 U.S. at 17, neither the law itself nor the resulting arrangement with a fund recipient constitutes an ordinary contract. See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) ("[T]he program cannot be viewed in the same manner as a bilateral contract governing

a discrete transaction."). The Act of Congress establishing the program remains binding law with the full force and preemptive authority of federal legislation under the Supremacy Clause, and thus falls squarely within the "laws" covered by Section 1983 and is fully capable of "secur[ing]" rights, within the meaning of that Act. See *Dalton* v. *Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996); *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 257-258 (1985); *Townsend* v. *Swank*, 404 U.S. 282, 285 (1971). Courts have traditionally adjudicated claims that rights vested in third parties by statutes were being invaded by one of the regulated parties. See, *e.g.*, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 565-566 (1851) (person not a party to an interstate compact, but who was injured by its violation, was entitled to "a civil remedy for an injury done by an obstruction").

Third, at the time Section 1983 was enacted, an appropriate analogy for Spending Clause legislation—and one that in fact was relied on in federal grant cases contemporaneous with the enactment of Section 1983—was that the recipient served as a trustee for the persons Congress intended its grants to benefit. See, *e.g.*, *Tucker* v. *Ferguson*, 89 U.S. (22 Wall.) 527, 572 (1874) ("The State accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States."); *Madison & P. R. Co.* v. *Wisconsin*, 16 F. Cas. 366 (C.C.W.D. Wis. 1879) (Harlan, J.) (No. 8938); *Farmers' Loan & Trust Co.* v. *Henning*, 8 F. Cas. 1045 (C.C.D. Kan. 1878) (No. 4666); *Chicago, B. & Q. R. Co.* v. *Attorney General*, 5 F. Cas. 594 (C.C.D. Iowa 1875) (No. 2666), aff'd on other grounds, 94 U.S. 155 (1876).[9] The

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[9] See also Joel Prentiss Bishop, *The First Book of the Law Explaining the Nature, Sources, Books, and Practical Applications of Legal Science and Methods of Study and Practice* § 468 (Boston 1868) ("The principle on which a third person is permitted to recover, on a promise made by the defendant for his benefit, in cases where * * * no part of the consi-

trust analogy comports with the congressional intent underlying most federal funding statutes because, when the federal government provides money to an entity in the form of a grant, the recipient is not normally expected to use the money for its own benefit, but rather receives it as part of a cooperative federal-state endeavor to benefit third parties. It was well-settled in the 1870s, as it is today, that the beneficiaries of a trust may sue the trustee for violations of its obligations. See *Duncan* v. *Jaudon*, 82 U.S. (15 Wall.) 165 (1872); *Oliver* v. *Piatt*, 44 U.S. (3 How.) 333 (1845); *Restatement (Second) of Trusts* §§ 197-199 (1957).

Fourth, even if a law passed pursuant to Congress's power under the Spending Clause is analogized to a contract, it is unlikely that Congress would have intended that the beneficiaries of the program be categorically barred from enforcing any rights accorded them under the law. Assuming *arguendo* that the relevant inquiry is the status of contract law at the time of Section 1983's enactment, rather than the prevailing law at the time the contract was made, third party beneficiaries of a contract traditionally were able to enforce rights granted under a contract, both in England and in the American courts, and that view predominated in 1873, when Section 1983 was enacted. See Peter Karsten, *The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case*, 9 Law and Hist. Rev. 327, 340-353 (1991); see also *id.* at 333 (courts permitted donee-beneficiaries to bring suit in 76% of reported Nineteenth Century cases).[10]

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deration proceeded from him, is, *that there is some property or thing in the hands of the defendant*, which is the consideration of the promise, held by the defendant *as a trust or a fund*."); Francis Hilliard, *The Law of Contracts* 426 (1872).

[10] In fact, the first American courts faced with the question applied the traditional English rule and held that, "when a promise is made to one, for the benefit of another, he for whose benefit it is made may bring an action for the breach." See Karsten, *supra*, at 340 (quoting *Schemerhorn* v. *Vanderheyden*, 1 Johns. (N.Y.) 139 (1806)). By 1859, seventeen American jurisdictions allowed third-party beneficiaries to sue, while only seven either did not or severely limited such suits. *Karsten*, *supra*, at 340; see also William W. Story, *A Treatise on the Law of Contracts Not Under Seal* 82 (1st ed. 1844) ("[I]n cases of simple contract, if one person make a promise to another for the benefit of a third, although no consideration move from such third person, it is binding, and either the party to whom it is made, or the party for whose benefit it is made may maintain an action upon it.").

Indeed, the most prominent and widely available contracts treatise at the time Congress enacted Section 1983[11] concluded that, "[i]n this country the right of a third party to bring an action on a promise made to another for his benefit seems to be somewhat more positively asserted [than in the English cases]; and perhaps it would be safe to consider this a prevailing rule with us." 1 Theophilus Parsons, *Law of Contracts* 390 (1st ed. 1853-1855) (footnote omitted). This Court appears to have shared that view. *Hendrick* v. *Lindsay*, 93 U.S. 143, 149 (1876) ("[T]he right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country.") (citing 1 Theophilus Parsons, *Law of Contracts* 467 (6th ed. 1873)).[12] And even those

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[11] See E. Allen Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 Mich. L. Rev. 1406, 1408-1409 (1987); Karsten, *supra*, at 353 n.150.

[12] See also 1 Joseph Chitty, *A Treatise on Pleading and Parties to Actions* 3 (10th Amer. ed. 1847) ("If the instrument be not under seal, it seems to be a general principle, that the party, for whose sole benefit it is evidently made, may sue thereon in his own name, although the engagement be not directly to or with him."); 2 James Kent, *Commentaries on American Law* 464 (12th ed. 1873) (O.W. Holmes, ed.) ("But it is understood to be now settled that, in a case of simple contract, if one person makes a promise to another for the benefit of a third party, the third party may maintain an action upon it, though the consideration does not move from him."). There was less consensus concerning the law regarding third-party enforcement of contracts under seal. See Arthur L. Corbin,

treatise writers who argued that third party beneficiaries could not sue to enforce a contract acknowledged a number of contrary cases recognizing such a right.[13]

The Brief for the Council of State Governments as Amicus Curiae in *Blessing* (cited at 520 U.S. at 350 (Scalia & Kennedy, JJ., concurring)) argued that third-party beneficiaries had no right to enforce a contract. Most of the authorities that amicus relied on, however, postdate the enactment of Section 1983, see Amicus Br. at 10-11 (citing authorities from 1880 and 1887), and pertain to a period of time when some American courts briefly adopted a stricter view of privity requirements. See generally Karsten, *supra*, at 340-353. Even during that era, however, third party beneficiaries still generally could enforce their rights in other ways, most notably by bringing equitable claims. See Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 27 Yale L. J. 1008, 1020-1022 (1918); see also *Karsten*, *supra*, 335-337, 366-368 & nn. 37-49 (citing and discussing the English cases).

At a minimum, the law governing the enforcement of contracts by third-party beneficiaries in 1873 did not so clearly

Contracts for the Benefit of Third Persons, 27 Yale L. J. 1008, 1019 (1918) (noting that "there is much authority" for the proposition that third-party beneficiaries could sue to enforce a contract under seal, but "many" courts "refus[e] to recognize a right in the beneficiary" of such a contract). Generally speaking, a contract "under seal" was a written commitment, to which the promisor's seal was affixed, that became irrevocable upon delivery to the promisee, regardless of whether there was consideration or agreement by the promisee. *Restatement (First) of Contracts* §§ 97, 102, 110 (1932).

[13] See Theron Metcalf, *Principles of the Law of Contracts, as Applied by the Courts of Law* 206 (Boston 1868, 1872) ("There are, however, many cases of simple contracts in which it has been decided, that where a person made a promise to another, for the benefit of a third, the third might maintain an action upon it, though the consideration did not move from him"); Hilliard, *supra*, at 426-427 ("many cases in the books, which must be regarded as maintaining the general proposition, that one party, for whose benefit a promise has been made to another, may himself maintain an action against the promisor").

bar such enforcement as to justify overruling more than two decades of precedent from this Court under Section 1983, which Congress itself has endorsed. See 42 U.S.C. 1320a-2, 1320a-10.[14]

B. Recognizing A Section 1983 Action Would Frustrate The Enforcement Mechanisms Congress Provided In FERPA

Even if FERPA creates substantive private rights of the sort that would otherwise be judicially enforceable, an action under Section 1983 is not available if Congress has explicitly or impliedly foreclosed that avenue of relief, such that a Section 1983 action would be "incompatible," *Blessing*, 520 U.S. at 341, or "inconsistent with" the "statutory framework," *Golden State*, 493 U.S. at 107. See also *Robinson*, 468 U.S. at 1009-1013; *Sea Clammers*, 453 U.S. at 13-20. Where, as here, Congress has not explicitly foreclosed a Section 1983 action, the determination whether the statute impliedly precludes such enforcement requires a careful and context-specific analysis of the overall structure and intended operation of the federal law, keeping in mind the impact the action would have on achievement of the statutory purposes. The inquiry, moreover, should not be wholly divorced from the question of whether the statute creates individually enforceable rights. Because the "key to the [Section 1983] inquiry is the intent of the legislature," *Sea Clammers*, 453 U.S. at 13; see also *Smith*, 468 U.S. at 1012, the less clear the evidence that Congress intended to create private rights, the more carefully the court should scrutinize the impact of a Section 1983 action on the enforcement mechanisms that

[14] See *Second National Bank* v. *Grand Lodge*, 98 U.S. 123, 124 (1878) (concluding that although "[n]o doubt the general rule is that * * * privity must exist," there are "confessedly many exceptions to it"); Bishop, *supra*, § 468 (finding "plenty of decisions denying the right of the third party to recover, and plenty of others in which the right was maintained").

Congress expressly provided. Furthermore, inherent in the question of whether a particular statute creates a new substantive federal right is what the scope of that right is—a question that necessarily imports considerations of remedy and relief. In this case, recognition of a private right of action—especially for damages—would frustrate rather than further the enforcement scheme Congress established in FERPA.

This Court has made clear that the federal funding agency's "generalized powers" to audit the conduct of the funding recipient and terminate federal funds are insufficient to foreclose a cause of action under Section 1983. See *Blessing*, 520 U.S. at 347-348; *Wilder*, 496 U.S. at 521; *Wright*, 479 U.S. at 428. In *Blessing*, for example, the Court found it significant that, unlike the federal programs at issue in *Sea Clammers* and *Robinson*, Title IV-D of the Social Security Act "contain[ed] no private remedy—either judicial or administrative—through which aggrieved persons can seek redress." 520 U.S. at 348. In addition, in *Wilder*, 496 U.S. at 523, the Court ruled that state administrative review procedures were insufficient to foreclose Section 1983 enforcement. See also *Wright*, 479 U.S. at 522 (Section 1983 action found, in part, because "HUD has not provided any formal procedure for tenants to bring to HUD's attention alleged [Public Housing Authority] failures to abide by the Brooke Amendment and HUD regulations").

FERPA provides the individualized, federal review mechanism that was missing in *Blessing*, *Wilder*, and *Wright*. First, Congress vested the Secretary of Education with substantially more authority over funding recipients than just the power to audit and the severe and inflexible (and thus rarely used) sanction of funding termination. Congress expressly commanded the Secretary—not the courts—to "take appropriate actions" to "enforce" FERPA and "to deal with violations" of its terms. 20 U.S.C. 1232g(f). To

that end, Congress armed the Secretary with the power and discretion to enforce FERPA by issuing a complaint to compel compliance through a cease-and-desist order, recovering funds improperly spent, withholding further payments to the educational institution, entering into a compliance agreement, or "tak[ing] any other action authorized by law," including suing for enforcement of FERPA's requirements. 20 U.S.C. 1234a, 1234c(a)(4), 1234e; 34 C.F.R. 99.67(a); see also *United States* v. *Miami Univ.*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000), appeal pending, No. 00-3518 (6th Cir.).

Second, Congress directed the Secretary to establish both an office and a review board "within the Department" for the purpose of "investigating, processing, reviewing, and adjudicating" individual complaints "alleg[ing]" that an educational institution has violated FERPA. 20 U.S.C. 1232g(g). The Secretary has designated the Department's Family Policy Compliance Office (Compliance Office) as the office responsible for carrying out those responsibilities in the first instance. See 34 C.F.R. 99.60(a) and (b).

The Secretary's administrative review scheme allows parents or students to file with the Compliance Office a written complaint, 34 C.F.R. 99.63, containing "specific allegations of fact giving reasonable cause to believe" that a violation of FERPA has occurred, 34 C.F.R. 99.64(a). The Secretary has established a limitations period of 180 days for filing such complaints. 34 C.F.R. 99.64(c). If the complaint is timely and contains the required information, the Compliance Office will initiate an investigation, 34 C.F.R. 99.64(b), notify the educational institution of the charge, and request a written response, 34 C.F.R. 99.65. After receiving the response, the Office may entertain "further written or oral arguments or information." 34 C.F.R. 99.66(a). If the Office finds a violation, it provides to both the complainant and the educational institution a notice of its factual findings and a "statement of the specific steps that the agency or institution must take to

comply" with FERPA. 34 C.F.R. 99.66(b) and (c)(1). In addition, the Office must provide "a reasonable period of time" under the circumstances "during which the educational agency or institution may comply voluntarily." 34 C.F.R. 99.64(c)(2).

If voluntary compliance is not achieved, the Secretary may initiate formal proceedings to compel compliance with FERPA and to order appropriate relief, such as a cease-and-desist order. See 34 C.F.R. 81.3, 99.67; see generally 34 C.F.R. Pt. 81, subpt. A (describing proceedings).[15] Those enforcement actions may be appealed to the Office of Administrative Law Judges—which the Secretary has designated as the review board required by FERPA Section 1232g(f). See 34 C.F.R. 99.60(c). An administrative law judge (ALJ) will conduct a hearing on the record, with the particularized application of evidentiary rules and discovery proceedings, as the ALJ deems appropriate. 34 C.F.R. 81.15-81.16. The parties—the fund recipient and the authorized Department official, see 34 C.F.R. 81.2—may be represented by counsel. 34 C.F.R. 81.8. The ALJ may allow a non-party, such as a private individual who has filed a complaint under FERPA, to participate in the proceedings to the extent such participation will aid disposition of the case. 34 C.F.R. 81.7. The ALJ, however, may place "appropriate limits" on that participation to ensure the efficient conduct of the proceedings. 34 C.F.R. 81.7(d)(2).

Thus, the individualized review accorded complaints filed with the Secretary's Compliance Office—under which it

[15] The Department of Education has informed us that, in FERPA's nearly three decades of operation, the statutory preference for cooperation and voluntary compliance has proved sufficient to enforce FERPA. With the exception of one case currently pending against Miami University, see 91 F. Supp. 2d 1132 (S.D. Ohio 2000), the Secretary has not found it necessary to resort to more formal enforcement measures, such as a cease-and-desist order.

investigates the facts, applies law to those facts, arrives at a decision, seeks voluntary compliance, and, if necessary, institutes formal enforcement proceedings to compel compliance —fairly approximates the individualized consideration that plaintiffs seek under Section 1983. At the same time, it affords claimants the benefits of both the Secretary's expertise and more prompt and informal procedures, while enabling the Secretary to screen complaints and protect fund recipients from unwarranted formal adjudications. That enforcement mechanism should be regarded as exclusive.[16]

Recognition of a private cause of action under Section 1983 would, in many ways, duplicate and frustrate the thoroughgoing administrative system that Congress prescribed —and that respondent never invoked. FERPA's focus on relatively informal adjudication and voluntary compliance in the first instance—an approach that has proven extremely successful in practice—would be overridden whenever a person claiming a violation of FERPA elects the necessarily adversarial approach of a privately initiated lawsuit. The substantial discretion that Congress and the regulations vest

[16] Consistent with that understanding, Senator Buckley, the architect of FERPA, submitted into the Congressional Record a question-and-answer exchange that strongly indicated that, in the absence of an express private right of action, administrative review was "the only means of enforcement" available for FERPA:

> 14. Is a right of private action created to enforce the Act or is the HEW compliance mechanism created by the Act the only means of enforcement?
>
> 14. A right of private action was intended in the Buckley amendment by reference to another part of the Senate bill. However, the Conference did not accept the complete language of the referred-to Senate provision, and the explicit right of private action is no longer in the law at this time. However, it may be interesting to note that the national PTA and the League of Women Voters are considering establishing monitoring activities to review and seek compliance with this law.

120 Cong. Rec. 36,534 (1974) (Sen. Curtis, on behalf of Sen. Buckley).

in the Secretary in reviewing individual complaints, initiating any necessary enforcement actions, selecting appropriate enforcement measures and remedies, and determining the appropriate extent of participation by private individuals in enforcement proceedings, could be trumped by the decision of any individual parent or student to file suit.

Significantly, moreover, FERPA provides that, "[e]xcept for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices" of the Department of Education. 20 U.S.C. 1232g(g). Congress mandated such centralized review and enforcement because, given FERPA's expansive coverage of every public school student and many private school students—including approximately 58 million potential 1983 plaintiffs in public schools[17]—it was quite "concern[ed] that regionalizing the enforcement of the law may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions." 120 Cong. Rec. 39,863 (1974) (Joint Statement); H.R. Conf. Rep. No. 1619, *supra*, at 11 (FERPA amendment "prohibits the regionalization of the enforcement of [FERPA]"); S. Conf. Rep. No. 1409, 93d Cong., 2d Sess. 11 (1974) (same); 120 Cong. Rec. 36,528 (1974) (Sen. Curtis) (Compliance Office "will serve as the focal point for investigating, processing, and reviewing violations of the Act"). It is implausible to suppose that the same Congress that feared balkanization of FERPA by regional offices of the Department of Education—all of which fall under the direct control of the Secretary—simultaneously intended to consign control over FERPA's interpretation to thousands of federal and state court judges and juries across the

[17] Thomas D. Synder & Charlene M. Hoffman, Nat'l Ctr. for Educ. Statistics, *Digest of Education Statistics* 52-53, 204 (forthcoming April 2002); see also 120 Cong. Rec. 39,862 (1974) (Joint Statement) (noting that FERPA "could possibly apply to each of the thousands of school districts and colleges across the nation").

country. Contrast *Wilder*, 496 U.S. at 505, 522 (Section 1983 action recognized where Congress's intent was to decentralize administration by reducing the federal role in rate-setting and enhancing the role of state and local governments). In short, Congress has textually identified who it wants to "enforce" FERPA and "deal with" complaints "alleg[ing] violations" of the Act—and that is the Secretary of Education, not private plaintiffs. 20 U.S.C. 1232g(f) and (g).[18]

Finally, the FERPA right claimed here is, at its core, the right to require fund recipients to comply with the conditions imposed on their receipt of federal funds. With respect to the Secretary's powers, the statute and implementing regulations identify prospective relief, such as a cease-and-desist order, as the appropriate enforcement tool, with the exception of the recovery of grant funds in certain circumstances. A cause of action under Section 1983 for damages for a violation of FERPA would be inconsistent with that remedial scheme. Indeed, most of the prior cases in which this Court recognized a private action under Section 1983 to enforce rights created by Spending Clause legislation sought only prospective injunctive relief. See *Blessing*, 520 U.S. at 337; *Wilder*, 496 U.S. at 504 & n.4; *Thiboutot*, 448 U.S. at 3; see also *Suter*, 503 U.S. at 352; *Rosado* v. *Wyman*, 397 U.S. 397, 421 (1970); cf. *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974) ("Though a § 1983 action may be instituted by public aid

[18] FERPA thus stands in sharp contrast to statutes like Title VI and Title IX, where (1) the evidence of congressional intent to create individually enforceable rights was so compelling as to support implied rights of action, (2) enforcement authority is spread across multiple federal agencies (there are approximately 25 agencies that have Title VI and Title IX enforcement authority), and (3) regional and decentralized enforcement is often utilized. See, *e.g.*, 65 Fed. Reg. 52,858, 52,860, 52,858 n.2 (2000); 65 Fed. Reg. 76,462 (2000); U.S. Comm'n on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* 6-7 (1996).

recipients" to enforce compliance with the conditions imposed on federal funding, "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young*, *supra*, and may not include a retroactive award which requires the payment of funds from the state treasury.").[19]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[19] In this case, the Washington Supreme Court upheld an award of punitive as well as compensatory damages. Pet. App. 28a, 36a. This Court will address the availability of punitive damages for an implied right of action to enforce the provisions of Spending Clause legislation (the Rehabilitation Act) in *Barnes* v. *Gorman*, No. 01-682.

APPENDIX

Statutory and Regulatory Provisions

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (1994 & Supp. V 1999) provides:

§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an

institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an

educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; record-keeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under

the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[1]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the

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[1] So in original. The period probably should be a semicolon.

purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the

existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with

the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding—

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 of Title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education

agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be

filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from—

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this chapter [20 U.S.C.A. § 1221 et seq.] or chapter 28 of this title [20 U.S.C.A. § 1001 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).

(j) Investigation and prosecution of terrorism

(1) In general

Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to—

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g) (5)(B) of Title 18, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guide-

lines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval

(A) In general

An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping

Subsection (b)(4) of this section does not apply to education records subject to a court order under this subsection.

34 C.F.R. Part 99 provides:

34 C.F.R. § 99.1:

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or post-secondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed

Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

34 C.F.R. § 99.2:

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

34 C.F.R. § 99.3:

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

Attendance includes, but is not limited to:

(a) Attendance in person or by correspondence; and

(b) The period during which a person is working under a work-study program.

Dates of attendance.

(a) The term means the period of time during which a student attends or attended an educational agency or

institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.

Educational agency or institution means any public or private agency or institution to which this part applies under § 99.1(a).

Education records.

(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.

Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

Party means an individual, agency, institution, or organization.

Personally identifiable information includes, but is not limited to:

(a) The student's name;

(b) The name of the student's parent or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable.

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

Student, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

34 C.F.R. § 99.4:

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

34 C. F. R. § 99.5:

§ 99.5 What are the rights of students?

(a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

34 C.F.R. § 99.6:

§ 99.6 [Reserved]

34 C.F.R. § 99.7

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

34 C.F.R. § 99.8:

§ 99.8 What provisions apply to records of a law enforcement unit?

(a)(1) Law enforcement unit means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a com-

ponent of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

34 C.F.R. § 99.10:

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to—

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall—

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of "Education records" in § 99.3, the student may have those records

reviewed by a physician or other appropriate professional of the student's choice.

34 C.F.R. § 99.11:

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

34 C.F.R. § 99.12:

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1)(A), (B), (C), and (D))

34 C.F.R. § 99.20:

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

34 C.F.R. § 99.21:

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

34 C.F.R. § 99.22:

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

34 C.F.R. § 99.30:

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

(1) Specify the records that may be disclosed;
(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provided the student with a copy of the records disclosed.

34 C.F.R. § 99.31:

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States;

(iii) The Secretary; or

(iv) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, "financial aid" means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if:

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to

personally identifiable information from education records for at least five years.

(iv) For the purposes of paragraph (a)(6) of this section, the term "*organization*" includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(iii)(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a

court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or non- forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(b) Paragraph (a) of this section does not forbid an educational agency or institution from disclosing, nor does it require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11), (13), (14), and (15) of this section.

34 C.F.R. § 99.32:

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

34 C.F.R. § 99.33:

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this

section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if:

(1) The disclosures meet the requirements of § 99.31; and

(2) The educational agency or institution has complied with the requirements of § 99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures made to parents of dependent students under § 99.31(a)(8), to disclosures made pursuant to court orders, lawfully issued subpoenas, or litigation under § 99.31(a)(9), to disclosures of directory information under § 99.31(a)(11), to disclosures made to a parent or student under § 99.31(a)(12), to disclosures made in connection with a disciplinary proceeding under § 99.31(a)(14), or to disclosures made to parents under § 99.31(a)(15).

(d) Except for disclosures under § 99.31(a)(9), (11), and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(e) If this Office determines that a third party improperly rediscloses personally identifiable information from education records in violation of § 99.33(a) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

34 C.F.R. § 99.34:

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The annual notification of the agency or institution under § 99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under Subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if—

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

34 C.F.R. § 99.35:

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a) The officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.

(b) Information that is collected under paragraph (a) of this section must:

(1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

34 C.F.R. § 99.36:

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken

against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) Paragraphs (a) and (b) of this section will be strictly construed.

34 C.F.R. § 99.37:

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

34 C.F.R. § 99.38:

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974 concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

34 C.F.R. § 99.39:

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or non-forcible sex offenses?

As used in this part:

Alleged perpetrator of a crime of violence is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson

Assault offenses

Burglary

Criminal homicide—manslaughter by negligence

Criminal homicide—murder and nonnegligent manslaughter

Destruction/damage/vandalism of property

Kidnapping/abduction

Robbery

Forcible sex offenses.

Alleged perpetrator of a nonforcible sex offense means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

Sanction imposed means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

Violation committed means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

34 C.F.R. § 99.60:

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, "*Office*" means the Family Policy Compliance Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term "*applicable program*" is defined in section 400 of the General Education Provisions Act.

34 C.F.R. § 99.61:

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

34 C.F.R. § 99.62:

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

34 C.F.R. § 99.63:

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, DC 20202-4605.

34 C.F.R. § 99.64:

§ 99.64 What is the complaint procedure?

(a) A complaint filed under § 99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

(b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office may extend the time limit in this section for good cause shown.

34 C.F.R. § 99.65:

§ 99.65 What is the content of the notice of complaint issued by the Office?

(a) The Office notifies the complainant and the educational agency or institution in writing if it initiates an investigation of a complaint under § 99.64(b). The notice to the educational agency or institution—

(1) Includes the substance of the alleged violation; and

(2) Asks the agency or institution to submit a written response to the complaint.

(b) The Office notifies the complainant if it does not initiate an investigation of a complaint because the complaint fails to meet the requirements of § 99.64.

34 C.F.R. § 99.66:

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.

(c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section:

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

34 C.F.R. § 99.67:

§ 99.67 How does the Secretary enforce decisions?

(a) If the educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may, in accordance with part E of the General Education Provisions Act—

(1) Withhold further payments under any applicable program;

(2) Issue a compliant to compel compliance through a cease-and-desist order; or

(3) Terminate eligibility to receive funding under any applicable program.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.